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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-318

DALLAS POWER & LIGHT COMPANY, ET AL.,
Petitioners,

v.

CENTRAL POWER & LIGHT COMPANY, ET AL.,
Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF DALLAS POWER & LIGHT COMPANY, TEXAS ELECTRIC SERVICE COMPANY, AND TEXAS POWER & LIGHT COMPANY TO THE MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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Petitioners Dallas Power & Light Company (DP&L), Texas Electric Service Company (TESCO), and Texas Power & Light Company (TPL), the operating subsidiaries of Texas Utilities Company (TU), are submitting this Reply Brief in response to certain arguments advanced by the Solicitor General on behalf of the Federal Energy Regulatory Commission (FERC or Commission) in his Memorandum in Opposition filed with this Court on October 26, 1978.[1]

[1] Petitioners responded separately to arguments advanced by the operating subsidiaries of Central and South West Corporation in a Reply Brief filed on October 18, 1978, since the Solicitor General was given an extension of time to file a Brief in Opposition.

In their Petition for a Writ of Certiorari the TU companies seek a determination that the Commission lacked authority to invoke jurisdiction under the Federal Power Act (the Act) over them since, at the time of the Commission's decision and at all subsequent times, they neither owned nor operated any facilities outside a single state and they neither, directly or indirectly, transmitted nor sold, at wholesale or retail, any electric energy in interstate commerce. In its Memorandum in Opposition, the Commission asserts that re-examination of the case by the Commission is appropriate, prior to any further consideration by judicial authority. This argument ignores the proper application of the jurisdictional standards of the Act and the concomitant public interest in a speedy resolution of this issue.

The FERC correctly states Petitioners' assertion that the Court of Appeals should have decided whether the Act delegates to the Commission any power to exercise jurisdiction over Petitioners, *i.e.* whether the TU companies are public utilities within the meaning of the Act. However, Petitioners have never claimed that the Court of Appeals delegated its ultimate responsibility to adjudicate the question of the agency's jurisdiction to the Commission.[2] Rather the Petitioners asserted that it needlessly avoided this basic issue when it had every reason to exercise the judicial function committed to it.[3]

The FERC further argues that the Court of Appeals sought a clarification of the Commission's rationale in

[2] Memorandum for the FERC in Opposition, at 4 (hereinafter cited as FERC Memo).

[3] Petition, at 9.

declining jurisdiction so that it could *properly* review the agency's initial determination of the issue (emphasis added).[4] Apparently, the FERC believes that the Court could not properly review its initial determination absent Commission clarification. Petitioners assert that further clarification by the Commission is not necessary for a proper exercise of judicial review.

All relevant facts necessary to a judicial decision on the jurisdictional issue as a matter of law are uncontroverted in the record, so remand of this proceeding for clarification of the Commission's reasoning is an unnecessary and dilatory act. Remand to the FERC will simply delay the judicial determination which this Court has mandated: ". . . [A]n agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board* v. *Nierotko,* 327 U.S. 358, 369 (1946). As a judicial function, it is a question of law wherein a clear statement of the agency's position is valuable but not necessary to the resolution of the case.

In *Conway Corp.* v. *FPC,*[5] a case involving allegations of price squeeze, the Court of Appeals for the District of Columbia Circuit considered whether an order of the Commission was sufficiently final for judicial review. The Commission contended that the order denying intervention on the price squeeze issue was not of the "definitive character" required by Section 313 (b) of the Federal Power Act for proper judicial review. The court held that where petitioners raise a question of law which will not be better defined by further development of the record, the order is suffi-

[4] FERC Memo, at 4.

[5] 510 F.2d 1264, 1267 (1975), *aff'd* 426 U.S. 271 (1976).

ciently final and ripe for judicial review, which it rendered in that case. Since the determination of the scope of Commission jurisdiction is a judicial function, *i.e.* a question of law, the Court of Appeals could quite properly have rendered a judgment on the proper interpretation of the statute. Thus a clear explanation of the Commission's position is not necessary to the exercise of the judicial function by the Court of Appeals.

As stated in the Petition, the remand merely postpones for a later day the final resolution of an important issue of the scope of federal administrative power over the delivery of electric energy, a matter of major national concern.[6] This proceeding has continued for more than two years already, and any further consideration of the issue by the Commission will only needlessly delay the ultimate determination of the scope of Commission jurisdiction in the courts.

The erroneous reasoning of the Commission is demonstrated by its reliance on *FPC* v. *Louisiana Power & Light Co.*[7] The Commission incorrectly cites *Louisiana Power & Light Co.* for the proposition that the Court of Appeals was justified in seeking a clarification of the Commission's rationale in declining jurisdiction in order to review properly the agency's initial determination of the issue. That case dealt with the issue of primary jurisdiction, not ripeness for review. In that case, this Court held that the Court of Appeals erred in deciding the question of jurisdiction:

> The FPC had exercised its primary jurisdiction and was conducting proceedings to determine whether the [pipeline in question] was subject to its jurisdiction. In that circumstance, the District Court and the Court of Appeals were obliged to defer to the FPC for the initial determination of its jurisdiction. [Citations omitted] The need to protect the primary authority of an agency to determine its own jurisdiction "is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the [agency]. While the [agency's] decision is not the last word, it must assuredly be the first." 406 U.S. at 647, *quoting Marine Engineers Beneficial Assn.* v. *Interlake S.S. Co.*, 370 U.S. 173, 185 (1962).

[6] Petition, at 12.

[7] 406 U.S. 621 (1972).

Instead of deferring to the Commission for an initial determination, the Court of Appeals rendered its own decision denying jurisdiction one month before the Commission concluded it had jurisdiction.[8] This Court concluded that a judicial determination should be based upon review of a Commission decision, as opposed to an original action in the courts. This Court saw no need to make the same disposition of the other issue in that case, the Commission's jurisdiction to order a curtailment plan, since the Court of Appeals had the Commission's final opinion and order before it and acted upon the opinion in reaching its decision.[9]

In the present case, the Commission had full opportunity to speak the first word concerning its jurisdiction, and the Court of Appeals had the Commission's final order before it in the normal course of review. Thus, far from supporting the Commission's proposition, *FPC* v. *Louisiana Power & Light Co.* better sup-

[8] *Id.* at 630n. 10.

[9] Argument was heard in the 5th Circuit one month after the FPC issued Opinion No. 606. *Id.* at 630n. 10.

ports Petitioners' request for a resolution of the legal issue concerning the agency's jurisdiction. The Commission decided in the first instance in a final and appealable order that it lacked jurisdiction over the TU companies, and the agency finding deserves the ultimate determination which is the responsibility of the reviewing courts.

There is clear precedent for action by this Court to decide the jurisdictional question which is fundamental to further Commission consideration of this proceeding. In *United States* v. *General Motors Corp.*,[10] a case concerned with the eminent domain powers of the Federal government, the Court of Appeals had remanded for trial in accordance with its opinion. The correctness of the decision of the court depended upon the scope and meaning of the protection afforded by the Fifth Amendment. This Court found that ruling fundamental to the further conduct of the case, and concluded that the Court of Appeals had given improper instructions on remand. In like fashion, this Court can now decide the question of Commission jurisdiction over the TU companies, a question of statutory interpretation which not only is fundamental to further action by the Commission, but should even dispose of any need for further Commission action.

The Commission does not take issue with the merits of Petitioners' argument that it lacks jurisdiction over Petitioners as a matter of law. Rather, the Commission's response is limited to a suggestion that Petitioners' argument is of recent vintage.[11] Such a contention is patently untrue. As Petitioners maintained in

[10] 323 U.S. 373, 377 (1945).

[11] FERC Memo, at 4-5.

their primary argument on Brief to the Court of Appeals, the TU companies could not be subject to jurisdiction under Part II of the Federal Power Act once any interstate flow of electric energy ceased.[12] This position was reiterated in the Petition for Rehearing before the Court of Appeals.[13] Thus Petitioners do not present any new issue to this Court in their Petition, but merely seek to obtain the adjudication of the threshold issue which the Court below failed to render.

For these reasons and for those presented in the Petition for Certiorari, and in the initial Reply Brief, Dallas Power & Light Company, Texas Electric Service Company and Texas Power & Light Company pray that this Court grant the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, that this Court reverse the decision of the Court of Appeals and that this Court direct the Court of Appeals to sustain the Com-

[12] Brief for Intervenors, at 17, *Central Power & Light Co.* v. *FERC*, 575 F.2d 937 (D.C. Cir. 1978).

[13] Petition for Rehearing and Alternatively Suggestion for Rehearing en Banc, at 2, 9, *Central Power & Light Co.* v. *FERC*, 575 F.2d 937 (D.C. Cir. 1978).

mission's determination that it is without jurisdiction over the TU companies as a matter of law.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have on this 31st day of October, 1978, served a copy of this Reply Brief, herein by mailing three copies thereof, together with a copy of this Certificate, postage prepaid, to counsel for all parties of record as follows:

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